Capital Insurance Bhd v Kasim bin Mohd Ali

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-155 OF 1995
NH CHAN, SITI NORMA YAAKOB JJCA AND KC VOHRAH J
12 SEPTEMBER 1995

Civil Procedure *— Parties — Substitution of respondent — Respondent died intestate pending appeal — Widow had not applied for letters of administration — Whether widow could be substituted as respondent*

Civil Procedure *— Appeal — Memorandum and records of appeal — Order appealed against not filed though judgment was included in memorandum of appeal — Whether r 18(4)(d) of Rules of the Court of Appeal 1994 had been complied with — Rules of the Court of Appeal 1994 r 18(4)(d)*

Insurance *— Motor Insurance — Compulsory third party motor insurance — Liability of insurer to satisfy judgment obtained against any person insured — Whether conditional upon delivery of certificate of insurance by insurer — Road Transport Act 1987 ss 91(4) & 96(1)*

The respondent had on 20 September 1994 obtained judgment against the driver and the owner of a motor vehicle ('the motor vehicle') which had knocked into him. When the judgment could not be enforced against the driver and owner, the respondent filed a recovery action against the appellant, as the insurer of the motor vehicle, under s 96(1) of the Road Transport Act 1987 ('the Act'). It was the appellant's defence that it never issued or delivered a certificate of insurance to the owner of the motor vehicle that collided into the respondent. The respondent contended otherwise. A letter written by the Registrar and Inspector of Motor Vehicles, Selangor ('RIMV') dated 2 March 1988 which stated that the appellant had issued a policy to the owner of the motor vehicle to cover the period from 17 October 1985 to 16 October 1986 was produced as evidence. The High Court judge accepted the respondent's argument and granted summary judgment against the appellant for the sum claimed, interest and costs. The appellant appealed. The respondent's counsel filed a separate application to substitute the respondent's widow as the respondent, as the respondent had since died. He further filed an application by way of a preliminary objection to strike out the notice of appeal and the records of appeal on the ground that the appellant had not complied with r 18(4)(d) of the Rules of the Court of Appeal 1994 ('the Rules') as the order appealed against dated 9 February 1995 had not been extracted and filed in the records of appeal.

Held, dismissing the preliminary objection and allowing the appeal:

(1) The only way substitution could be done where a deceased had died intestate is through the widow obtaining letters of

administration of her husband's estate. In this case, the widow had not yet applied for letters of administration (see p 428I). A

(2) Rule 18(4)(d) of the Rules requires an appellant to include in his memorandum of appeal, a copy of the judgment, decree or order appealed from. In this case, a copy of the judgment had been included in the memorandum of appeal. Since that judgment, in as much as the order, had been appealed against, there was no merit to the respondent's preliminary objection, particularly when r 18(4)(d) makes reference to 'a judgment, decree or order' (see p 429D). B

(3) The respondent's cause of action against the appellant was founded under s 96(1) of the Act under which an insurer is duty-bound to satisfy any judgment obtained against any person insured by the insurer in respect of third party risks. However, the liability to satisfy such judgment is conditional upon the insurer having delivered a certificate of insurance under s 91(4) of the Act to the person by whom the policy has been effected. The letter from the RIMV was not evidence of any delivery of such certificate (see p 429E and H–I). C D

(4) Since it was clear that there had been no proof of delivery of the certificate of insurance as required by s 96(1) of the Act, this in itself provided a triable issue for which the appellant was entitled to a full trial. Added to this was the fact that the appellant had pleaded that the RIMV's letter was forged, a fact which had been confirmed by the Motor Insurers Bureau of West Malaysia (see p 430B). E F

[Bahasa Malaysia summary

Penentang telah mendapatkan penghakiman pada 20 September 1994 terhadap pemandu dan pemunya sebuah kenderaan bermotor ('kenderaan tersebut') yang telah melanggarnya. Apabila penghakiman tersebut tidak dapat dikuatkuasakan terhadap pemandu dan pemunya, penentang telah memfailkan tindakan untuk mendapat kembali terhadap perayu, sebagai penanggung insurans kenderaan tersebut, di bawah s 96(1) Akta Pengangkutan Jalan 1987 ('Akta tersebut'). Pembelaan perayu ialah bahawa ia tidak pernah mengeluarkan atau menghantar serah sijil insurans kepada pemunya kenderaan tersebut yang telah berlanggar dengan penentang. Penentang berhujah sebaliknya. Sepucuk surat yang ditulis oleh Pendaftar dan Pemeriksa Kenderaan, Selangor ('PPKS') bertarikh 2 Mac 1988 yang menyatakan bahawa perayu telah mengeluarkan polisi kepada pemunya kenderaan tersebut untuk jangkamasa daripada 17 Oktober 1985 sehingga 16 Oktober 1986 telah dikemukakan sebagai bukti. Hakim Mahkamah Tinggi menerima hujah penentang dan memberikan penghakiman terus terhadap perayu untuk jumlah yang dituntut, faedah dan kos. Perayu membuat rayuan. Peguam penentang G H I

telah memfailkan permohonan yang berasingan untuk menggantikan balu penentang sebagai penentang kerana penentang telah meninggal dunia. Penentang juga telah membuat bantahan permulaan untuk membatalkan notis rayuan dan rekod rayuan atas alasan bahawa perayu tidak mematuhi k 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah tersebut') kerana rayuan terhadap perintah bertarikh 9 Februari 1995 tidak diekstrak dan difail di dalam rekod rayuan.

Diputuskan, menolak bantahan permulaan dan membenarkan rayuan:

(1) Apabila si mati meninggal dunia tanpa meninggalkan wasiat, penggantian hanya boleh dibuat jika balu kepada si mati memperolehi surat kuasa mentadbir ke atas estet suaminya. Dalam kes, ini surat kuasa mentadbir belum dipohon oleh balu itu (lihat ms 428I).

(2) Kaedah 18(4)(d) Kaedah tersebut menghendaki perayu memasukkan ke dalam memorandum rayuan, sesalinan penghakiman, dekri atau perintah di mana rayuan dibuat. Dalam kes ini, satu salinan penghakiman telah dimasukkan dalam memorandum rayuan. Bantahan permulaan penentang tidak mempunyai merit kerana rayuan telah dibuat terhadap penghakiman mahupun perintah. Lebih-lebih lagi, k 18(4)(d) merujuk kepada 'penghakiman, dekri atau perintah' (lihat ms 429D).

(3) Kausa tindakan penentang terhadap perayu diperolehi di bawah s 96(1) Akta tersebut di mana penanggung insurans adalah bertanggungjawab untuk memenuhi sebarang penghakiman yang diperolehi terhadap sesiapapun yang telah diinsuranskan oleh pemegang insuran berkaitan dengan risiko pihak ketiga. Walau bagaimanapun, liabiliti untuk memenuhi penghakiman itu adalah dengan syarat penanggung insurans menghantar serah sijil insurans kepada orang yang mengambil polisi itu di bawah s 91(4) Akta tersebut. Surat daripada PPKM bukanlah bukti bahawa sijil itu telah dihantar serah (lihat ms 429E dan H–I).

(4) Adalah jelas bahawa tidak ada bukti penghantarserahan sijil insurans seperti yang dikehendaki oleh s 96(1) Akta tersebut, dan ini membolehkan isu ini dibicarakan dan perayu berhak untuk perbicaraan penuh. Lagipun, sesungguhnya perayu telah mengatakan bahawa surat daripada PPKM adalah palsu, dan ini telah disahkan oleh Biro Penanggung Insurans Motor Malaysia Barat (lihat ms 430B).]

Notes

For cases on motor insurance, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 133–214.

For cases on parties, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2362–2498.

For cases on records of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras

Legislation referred to

Probate and Administration Act 1959 s 39
Road Transport Act 1987 ss 96(1), 91(4)
Rules of the Court of Appeal 1994 r 18(4)(d)
Rules of the High Court 1980 O 14

Appeal from: Civil Suit No 23–91–1994 (High Court, Shah Alam)

Manjit Singh (*Tunku Farik* with him) (*Azim Ong & Krishnan*) for the appellant.
BS Sidhu (*Sharon Sidhu* with him) (*BS Sidhu & Co*) for the respondent.

Cur Adv Vult

Siti Norma Yaakob JCA (delivering the judgment of the court): In this recovery suit, the respondent had on 20 September 1994 in proceedings first commenced in the Sessions Court, Kelang, and later transferred to the High Court at Shah Alam, obtained judgment against the driver and the owner of a motor vehicle BBQ7196 which had knocked into him. When the judgment could not be enforced against the driver and owner, the respondent filed a recovery action, Civil Suit No 23–91–94, against the appellant, as the insurer of the motor vehicle, under s 96(1) of the Road Transport Act 1987. In proceedings, inter alia, for summary judgment under O 14 of the Rules of the High Court 1980, the respondent obtained judgment against the appellant on 19 February 1995 for the sum claimed, interest and costs.

The appellant has appealed against the order for summary judgment and before us, Mr BS Sidhu, counsel for the respondent, has also filed two separate applications:

(1) to substitute one Asiah bte Abdul Manap, the widow of the respondent, as the respondent in these proceedings as the respondent has since died;

(2) to strike out the notice of appeal and the records of appeal on the ground that the appellant had not complied with r 18(4)(d) of the Rules of the Court of Appeal 1994.

We dealt with Mr BS Sidhu's applications first and in relation to the application for substitution, when it was pointed out to Mr BS Sidhu, that the only way substitution could be done where a deceased had died intestate is through the widow obtaining letters of administration of her husband's estate, and in this case the widow has not yet applied for letters of administration, Mr BS Sidhu readily agreed to withdraw the application. In any event, on the death of the respondent, his estate devolves by operation of law on the official assignee under s 39 of the Probate and

A Administration Act 1959 until administration is applied for and granted to any lawful kin of the deceased.

As to the second application to strike out the notice of appeal and records of appeal, since the objection raised in the application can equally be argued before us in the appeal itself, we made no order on that second B application but allowed Mr BS Sidhu to raise the same objection when presenting his arguments in answer to the appeal.

This he did by way of a preliminary objection. He contended that the notice of appeal and records of appeal are bad in law as the order appealed against dated 9 February 1995 has not been extracted and filed in the records of appeal. What forms part of the records is only the judgment but C not the order. As such, r 18(4)(d) of the Court of Appeal Rules 1994 has not been complied with.

This rule requires an appellant to include in his memorandum of appeal, a copy of the judgment, decree or order appealed from. A perusal of the records of appeal at pp 7–10 shows that a copy of the judgment has D been included in the memorandum of appeal and since that judgment, in as much as the order, has been appealed against, we see no merits to the respondent's preliminary objection, particularly when r 18(4)(d) makes reference to a judgment, decree or order.

Coming now to the merits of the appeal, the respondent's cause of E action against the appellant is founded under s 96(1) of the Road Transport Act 1987 under which an insurer is duty bound to satisfy any judgment obtained against any person insured by the insurer in respect of third party risks. However, the liability to satisfy such judgment is conditional upon the insurer having delivered a certificate of insurance under s 91(4) of the same Act to the person by whom the policy has been effected. It is the F appellant's defence that it never issued or delivered a certificate of insurance to the owner of the motor-vehicle that collided into the respondent.

The respondent's reply to this is that such a certificate was issued as is evidence by a letter written by the Registrar and Inspector of Motor Vehicles, Selangor ('RIMV') dated 2 March 1988 to the respondent's G solicitors in answer to the latter's enquiry as to the status of the motor vehicle. Section 96(1) speaks of the delivery of a certificate of insurance by an insurance company to the insured as a precondition before liability can be pinned against the insurers. The certificate must therefore be issued and delivered by the appellant to the insured and not by anybody else. The H letter from the RIMV does not fulfill the requirements of s 96(1). On the face of it, it merely states that the appellant had issued a policy to the owner of the motor-vehicle, BBQ 7196 to cover the period from 17 October 1985 to 16 October 1986. The policy may well have been issued by the appellant, but the letter from the RIMV is not evidence of any delivery of a certificate of insurance by the appellant to the insured as I required by s 96(1). To regard that it did as did the trial judge is totally erroneous. The letter from the RIMV is not the certificate that is envisaged by s 96(1). The certificate has never been produced by the respondent and

the appellant has denied delivering one to the insured person. On the contrary, it has also alleged that the letter from the RIMV has been forged.

Since it is very clear that there has been no proof of delivery of the certificate of insurance as required by s 96(1), this in itself provides a triable issue for which the appellant is entitled to a full trial. Added to this is the fact that the appellant has pleaded that the letter from the RIMV to have been forged, a fact which had been confirmed by the Motor Insurers Bureau of West Malaysia. This makes it all the more undesirable and inappropriate for this suit to be dealt with summarily.

On that finding, we allowed the appeal with costs. The appellant was given unconditional leave to defend the action, and the judgment sum which had already been paid to the respondent's solicitors was ordered to be refunded to the appellant's solicitors forthwith together with all accrued interests. Lastly, we ordered that the deposit be refunded to the appellant.

Order accordingly.

Reported by TA Loh